
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 96-004
ALJ CASE NO. 95-ERA-4
DATE: FEB 19 1997

In the Matter of:

EARL VANDORN KEENE,
COMPLAINANT,

v.

EBASCO CONSTRUCTORS, INC., a/k/a RAYTHEON CONSTRUCTORS, k/n/a RAYTHEON ENGINEERS AND CONSTRUCTORS, INC.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

DECISION AND ORDER OF REMAND

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993). Before the Board for review are the Recommended Decision and Order (R. D. and 0.) and Errata, issued by the Administrative Law Judge (ALJ) on September 29, 1995, and October 10, 1995, respectively, in which the ALJ recommends that Complainant Earl Vandorn Keene (Keene) be awarded back pay and certain other relief. *See* 29 C.F.R. § 24.6 (1996). Although we do not agree entirely with the ALJ's analysis, we agree that Keene is entitled to relief for his wrongful layoff on March 24, 1994. The case is remanded to the ALJ for a recommended decision on costs and expenses.

BACKGROUND

Keene is a certified electrician who was employed by Respondent Ebasco Constructors, Inc. (Ebasco), at the South Texas Nuclear Project (South Texas) for various

periods of time between 1982 and 1994.[2] Most recently, Keene worked at South Texas from August 1993 until January 18, 1994; again from March 10 until March 24, 1994; and then from June 2 until June 9, 1994. Transcript (T.) at 56-57. He filed this complaint in September 1994.

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Keene alleges that he was laid off on March 24 because he raised protected complaints about practices that were occurring on the demineralization (demin) skid project. On March 17, 1994, Keene, who had not yet received his unescorted plant access clearance, was assigned to work with Arthur Renfro, an uncertified electrician with unescorted access, who had been working at South Texas steadily since August 1993. Keene and Renfro were assigned to terminate electrical cables on the demin skid project under the supervision of foreman John Douglas and general foreman Don Sciba. Under HL&P procedures, the task required two electricians, one to perform the termination and one to verify. Complainant's Exhibit (CX) 18; T. at 78, 243. Both the performer and the verifier had to sign a document upon completion of the task.

It is undisputed that Keene complained to Douglas that Renfro was taping cable wire in violation of quality control procedures. According to Keene he also complained about record falsification in that Douglas was requiring him to sign the paperwork as the performer when Renfro actually was performing the work and that Douglas was signing off as verifier without actually verifying the work. Renfro and Douglas deny that Keene raised any concerns about record falsification.

Later that day after talking to Sciba. Douglas responded that taping was the preferred procedure. Keene and Renfro were reassigned to a different project, the time run meter project. Both the time run meter and the demin skid projects involved cable terminations and required the same or similar documentation procedures. Complainant's Brief at 10; Respondent's Brief at 12.

Keene testified that he discussed his concerns with another Ebasco employee and friend who rode in his car pool, J.D. Riley, and asked Riley to report his concerns to management. Riley told Bill Johnson, an Ebasco supervisor outside of Keene's chain-of-command, who understood the issue as an allegation that the supervisor, Douglas, was not properly verifying work on the time run meter project.

On March 24, 1994, Keene learned that he going to be laid off, and he asked to be processed out that same day. The layoff decision was made by Sciba. Ebasco investigated the time run meter project and on March 31, 1994, found no basis to conclude that Douglas was committing a violation. CX 5. Douglas resigned on April 1.

Not long after his March 24 termination Keene received a union hiring hall call to report back to work at South Texas on June 2, 1994. In the interim, during April, Keene allegedly reported his protected concerns to a congressional committee that was

investigating suspected wrongdoing at South Texas. In May, Keene accompanied a friend on business to the South Texas plant and while there was required to submit to alcohol testing. Keene passed the tests. He alleges that the testing was unwarranted and retaliatory. Keene's attorney raised this allegation of retaliation in a letter dated June 2, 1994, addressed to Frank Teague, the Ebasco site manager.

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Upon reporting back to work on June 2, Keene was administered the Fitness-for-Duty drug test that is required of all new employees. On June 9, he was informed that he failed the test and was escorted from the premises. Although Keene alleged in his ERA complaint that the test procedure and results were retaliatory, he subsequently chose not to pursue the allegation in this forum. T. at 16, 444-45; Complainant's Brief of September 1, 1995, at 22. He contends, however, that from June 6-8, Ebasco retaliated against him by assigning him either no duties or demeaning work. On June 21, he went back to work for Ebasco in the Galveston district and worked there steadily for five months.

On July 12, 1994, Keene reported his concerns to the Nuclear Regulatory Commission (NRC), which issued a report dated April 21, 1995, stating that it did not substantiate his charges. CX 22. The NRC also stated, however, that:

> In the [falsification] allegation described above, the alleger would be in violation of procedures to sign as the performer when he did not perform the work, and he would be in violation of procedures to sign as the verifier if he did not supervise the uncertified worker.

CX 22 at 4-70.

DISCUSSION

1. The March 24 Lay-Off

The ALJ found that Keene met his burden to prove that the March 24 lay-off was retaliatory. R. D. and O. at 12.[3] After crediting Keene's testimony that he complained to Douglas on March 17 about both the falsification and taping issues, the ALJ further found that Douglas discussed these concerns, constituting protected internal complaints under the ERA, with Sciba. R. D. and O. at 7, 12. Noting that Sciba and Douglas also were aware that an investigation was underway by Ebasco because of Keene's allegations about the time run meter project and that only seven days had passed since he first complained, the ALJ concluded that Sciba included Keene in the layoff in retaliation for Keene's protected activity. R. D. and O. at 12.

Ebasco argues that the ALJ erred in crediting Keene's testimony that he complained to Douglas about both improper cable taping and document falsification. According to Ebasco Keene fabricated the demin skid falsification issue and only raised falsification

concerns in connection with the meter project, which Sciba did not become aware of until the day after Keene had been processed out. Under Ebasco's theory, the only complaint of which Sciba was aware at the time he decided to lay off Keene was the taping concern, which was not "any big deal." T. at 87. In any event, Ebasco argues, concerns about document falsification and taping cable wire are not protected under the ERA and did not motivate Sciba. We reject these arguments.

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In sum, we agree that before he selected the workers for layoff, Sciba was aware of Keene's charges to Douglas about the demin skid project, and he also believed that Keene had raised similar complaints about falsification on the meter project. We find that the complaints of falsification regarding either project were protected and even if Keene did not in fact raise such complaints about the meter project, Sciba's layoff in retaliation for Keene's actual or perceived protected activity violated the ERA. *Cf Willy v. Coastal Corp*., Case No. 85-CAA-1, Sec. Dec., June 1, 1994, slip op. at 13-14 (focus should be on employer's perception of employee's activity and whether employer was motivated by its belief that employee had engaged in protected activity).

First, Ebasco has presented no compelling reason to overturn the ALJ's decision to credit the testimony of Keene over that of Renfro and Douglas. *See Seda v. Wheat Ridge Sanitation Dist.,* Case No. 91-WPC-1, Sec. Dec., Sept. 13, 1994, slip op. at 2; *Bartlik v. TVA,* Case No. 88-ERA-15, Sec. Dec., Apr. 7, 1993, slip op. at 5 n.2, *aff'd,* 73 F.3d 100 (6th Cir. 1996) (credibility determinations are considered in light of consistency and inherent probability of testimony). We add that Keene's account of the events of March 17 has been consistent throughout and is supported by the record as a whole.

The letter to Teague dated June 2, 1994, contains the following introductory paragraph:

> In March of 1994, Earl V. Keene was employed at South Texas Nuclear project. A request was made of him to sign off on a work package as the performer of the work done when he in fact had not done the work..... Mr. Keene refused and reported the incident. Approximately one week later his employment was terminated.

CX 11. This description squares with Keene's allegations about the demin skid project incident on March 17. Riley's hearing testimony also is consistent with Keene's account, however, either Riley or Johnson or both confused the projects involved. R. D. and O. at 6; T. at 94, 213-17; CX 12 at K1175, K1177, K1267. Ebasco argues that Keene would not have felt the need to go to Riley and request that he contact Johnson had Keene already disclosed his concerns to Douglas. However, Johnson himself, as a manager outside Keene's chain of command, recognized the danger of reporting to the "fox guarding the henhouse." *See* CX 31 at 62.[4]

Most significantly, Ebasco did in fact commit the falsification exactly as alleged by Keene, and Renfro and Douglas attempted to conceal this wrongdoing from the licensee HL&P, all of which undermines the credibility of Renfro and Douglas and lends even more credence to Keene's account. At the hearing Renfro admitted that he performed cable terminations without signing off as the performer because the crew had been instructed by Douglas and Sciba that uncertified electricians were not to sign as performer. T. at 30, 35, 58. Douglas testified that his practice was to have the certified worker sign as performer even if he did not perform the work. T. at 240, 246. Douglas would have some other certified electrician working in the area verify the termination, even if that other electrician did not witness the work being

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performed. T. at 243, 246. Douglas was "trying to keep all certified people to [sic) doing the performing and also the verifying." T. at 243-44.[5] Douglas and Renfro claim that they believed that this practice was permitted under an HL&P procedure referred to as "Work Direction." Keene correctly believed that it constituted record falsification. CX 22; T. at 362.

> HL&P launched an investigation into Keene's concerns in the summer of 1994. The report by the HL&P investigator, Andrew Woods, contains the following entries:
> . . . Renfro stated that he has never witnessed this [someone signing off on work packages as the performer for work performed by someone else] being done at STP. Renfro stated that he never performed work and had someone sign off for him in violation of procedures.
> . . . Douglas stated that Keene was not asked to sign for work that Keene did not perform.

CX 12 at K1178-79. Sciba told Woods that Keene was not asked, instructed, or directed to sign work packages for work Keene did not perform. CX 12 at K1179. Sciba's statement is clearly at odds with his work practice. T. at 58 (Renfro stating that instructions came from general foreman Sciba).

On October 11, Woods approached Renfro and Douglas again with more information, and Renfro finally confirmed that he was performing cable terminations though not certified to do so. CX 12 at K1179. Only then did Renfro and Douglas tell Woods that they believed their actions were permitted under the "Work Direction" procedure.

On October 13, Teague told Woods that:

> ECI [Ebasco] craft personnel do not perform work in accordance with the HL&P approved procedure, OPGP03-ZA-01 13, Work Direction and are not included on the Work Direction Matrix which would, according to OPGP02-ZA-0090 allow them to work under work direction.

CX 12 at K 1 18 1. HL&P management confirmed that Ebasco should have certified people doing work and if they are not certified, they should not be signing off as the performer of the work. T. at 361-62. Immediately thereafter, Ebasco initiated a Station Problem Report. dated October 13, 1994, citing the possibility that on March 17, 1994, on the demin skid project, Renfro performed cable terminations without properly signing off as the performer. CX 17.

Douglas testified that he went to Sciba on March 17 for "firm clarification" on Keene's taping charge, and the ALJ's inference that he also would have raised the falsification charges is rational. T. at 242. In addition, Douglas testified that Sciba told

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him that records were being pulled for review because of Keene's falsification charges, but Douglas could not remember if Sciba told him before or after Keene's layoff. T. at 257. There is ample support for the ALJ's finding that Johnson started investigating, and pulling work package records, before Keene's layoff. R. D. and O. at 10, 12.[6] According to Johnson, Sciba was angry and resentful about his investigation and Sciba asked Johnson "point blank" if Keene was the one who brought forth these charges. CX 31 at 72; CX 14.

Also, a rumor had been circulating. During an interview with Teague in June 1994, the following exchange took place:

> Question by Frank [Teague] to Don [Sciba]:
> What do you know of a work package falsification charge made by electrician Earl Keene during March 1994?
> Don [Sciba] replied that:
> He had only heard a rumor concerning Keene and a falsification charge but heard nothing directly while Keene was on site . . . .

CX 12 at K1253; *see also* CX 12 at K1177 (Johnson referring to the "rumor" as serious). Despite his denial of "direct" information before Keene left, we conclude that Sciba knew that Keene had complained and blown the whistle at the plant.

The amended ERA provides, in relevant part, that no employer may discharge or otherwise discriminate against any employee because the employee:

> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) . . . .

42 U.S.C. § 5851(a)(1). Ebasco contends that Keene's alleged complaints did not involve a potential violation of the ERA or the Atomic Energy Act or any issue related to nuclear safety as prescribed in *DeCresci v. Lukens Steel Co.,* Case No. 87-ERA-13, Sec. Dec., Dec. 16, 1993.

In *DeCresci*, the complainant charged retaliation based on concerns about welding procedures in the construction of sonarspheres for nuclear submarines. Comparing DeCresci's complaints to internal complaints about race discrimination or occupational safety, the Secretary held that DeCresci's concerns, unrelated in any way to activities regulated under the ERA and nuclear or radiation safety, were not the type of environmental concerns that the ERA's whistleblower provision intended to reach. *See also Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1994, slip op. at 8-9 (describing the issue as jurisdictional). In contrast, this case which involves an allegation of retaliation based on complaints about improprieties related to the performance of electrical work within an operating nuclear power plant, comes within the purview of the ERA's whistleblower provision.

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Whistleblowers are protected under the ERA to further the Congressional purpose of protecting the public from the hazards of nuclear power and radioactive materials due to unsafe construction or operation of nuclear facilities. *Beck v. Daniel Const. Co.,* Case No. 86-ERA-26, Sec. Dec., Aug. 3, 1993, slip op. at 7. By protecting whistleblowers, safety and quality problems in the nuclear industry will continue to be brought to light and resolved before accidents or injury occur. *Hill v. TVA,* Case No. 87-ERA-23, Sec. Dec., May 24, 1989, slip op. at 9-10.

In keeping with the statutory purpose, the whistleblower provision is interpreted broadly to protect internal complaints that are based on reasonably perceived violations of the ERA and its implementing regulations. *See, e.g., Smith v. Esicorp. Inc.,* Case No. 93-ERA-00016, Sec. Dec., Mar. 13, 1996, slip op. at 7 (complaint about scaffolding construction protected); *Hobby v. Georgia Power Co.,* Case No. 90-ERA-30, Sec. Dec., Aug. 4, 1995, slip op. at 13-16 (complaint about licensee's reporting structure protected); *cf. Tyndall v. United States EPA,* Case No. 93-CAA-6, Board Dec., June 14, 1996, slip op. at 5-7 (complaint about official misconduct and interference in fraud investigation may be protected as activity in furtherance of statutory objectives of Clean Air Act). An employee's reasonable belief that his employer is violating the ERA's requirements is sufficient, irrespective of after-the-fact determinations regarding the correctness of the employee's belief. *Hobby,* slip op. at 16; *Minard,* slip op. at 17-24. Thus, contrary to Ebasco's argument, the conclusion reached by the NRC after investigating Keene's concerns that the particular cables and work packages at issue were "not safety-related" is not dispositive. CX 22 at 4-70. The very fact that the NRC chose to investigate Keene's allegations to determine Ebasco's compliance with its regulations supports a finding in Keene's behalf. As explained below, Keene's concerns were neither frivolous nor extraneous to the safety interests promoted by the whistleblower protections of the ERA.

Keene believed that the electrical cables involved here were part of "permanent plant equipment" that was governed by quality control procedures overseen by the NRC. *See* T. at 73. Renfro agreed that the cables were permanent plant equipment governed by specific procedures. T. at 61. Permanent plant equipment is equipment that must be

maintained and in good working order when the nuclear plant is operating. T. at 71. The demin skid project purified water for the reactor and various processes and ran pumps for fire prevention. T. at 61-62, 70-71. The meter project involved a timing mechanism to facilitate maintenance service on various pumps and motors. T. at 73. The task of terminating a cable, to which Keene and Renfro were assigned, puts the electrical cable in service, and if not properly performed results in a short or malfunction. T. at 59.

Douglas' testimony indicates that the Dual Verification procedure, CX 21, which expressly references the NRC regulations at 10 C.F.R. Part 50, Appendix B, may in fact be applicable to the projects. T. at 244.[7] We conclude that it was entirely reasonable for Keene to believe that procedures governing electrical work on pumps and motors that are essential to fire prevention and the smooth operation of the reactor were regulated by the NRC for the safe operation of the nuclear plant. In

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turn it was reasonable to believe that a contractor's failure to employ properly certified electricians to perform work on this equipment and the contractor's concurrent falsification of documents to conceal that failure would be subject to reprimand by the NRC. Even if the uncertified electricians were competent workers, certification requirements presumably serve to assure safe, quality performance. Failure to correctly document who performed which work thwarts accountability and tracing, measures which also assure quality performance in the nuclear facility. *See* T. at 416; 10 C.F.R. § 50.9 (1993). The NRC report written in response to inquiries by the Subcommittee on Oversight and Investigations of the U.S. House of Representatives' Committee on Energy and Commerce echoed the concern that alleged record falsification was potentially significant as an indicator of willful circumvention of established procedures in order to facilitate work activities at the possible expense of safety. CX 23 at 5-1, 19, 20.[8]

Keene's complaints motivated Sciba in laying off Keene. As the reason for Keene's layoff, Ebasco argues only that it resulted from HL&P's specific instructions to Ebasco to reduce its force. We find the argument lacking. While HL&P did order a layoff, there is scant evidence concerning why Sciba selected Keene in particular, and that evidence is suspect.

Sciba did not testify at the hearing, but in his statement to the DOL investigator Sciba intimated that Keene was chosen because of a poor attendance record. CX 12 at K1255. However, there is other evidence that Keene's attendance was not a problem. CX 30 Tab 9.[9] Upon discovering in May 1994 that Keene was being sent back to South Texas from the union hall, Sciba and his superior, Gary Kaminsky, told Teague and Casey Davis, Ebasco's labor relations manager, that they did not want Keene back on site because of his "lack of cooperation" or his requiring "a lot of supervision in order to get his work completed." CX 30 at 79, 21-23; T. at 296. Davis, as well as Keene, testified that they had never heard such criticism before. T. at 297, 67. Nor does the record support it. Keene's prior performance rating from January 1994 was "good" in all categories,

including cooperation, while the evaluation given by Sciba on March 24, 1994, rated him as poor in cooperation and several other categories. CX 4. There is no explanation for this downgrade other than Keene's protected complaining.

As evidence of non-retaliatory motives, Ebasco points out that: (1) three of the seven electricians laid off were as qualified as Keene, (2) Keene was rehired twice after the lay-off, and (3) Keene and Riley both acknowledged earlier that the layoff was not retaliatory. We are not persuaded. At the hearing Keene provided a plausible explanation for his earlier statement which the ALJ accepted. R. D. and O. at 12 n.6; T. at 198. Riley provided an equally plausible explanation, T. at 230-31, and, in any event, the presence or absence of retaliatory motive is provable by circumstantial evidence even if a witness testifies that he did not perceive such a motive. *Ellis Fischel State Cancer Hospital v. Marshall,* 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981); *accord Mackowiak,* 735 F.2d at 1162. Second, while Keene was rehired after March 24, it was over strong protests by Sciba and Kaminsky. T. at 299. Finally, the record does not show whether the three other laid-off electricians had received unescorted access clearance. Keene received his clearance the day he

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was laid off. T. at 70; R. D. and O. at 6. Unescorted access clearance is a valuable consideration to Ebasco. T. at 292-93, 297.

Considering Sciba's various, unsupported explanations; his unexplained downgrade in Keene's performance rating; the temporal proximity between Sciba's knowledge of Keene's complaints and the layoff; Keene's value to Ebasco as a certified electrician with unescorted access; the accuracy of Keene's concerns and the attempted coverup; the animus exhibited by Sciba and Kaminsky; and the amount of work affected by the alleged violations, we conclude that Sciba laid off Keene due to his contempt for Keene's protected complaints concerning document falsification. *See, e.g., Bechtel Const. Co. v. Secretary of Labor,* 50 F.3d 926, 934, 935 (11th Cir. 1995) (criticism of work based on protected activity not legitimate) and (shifting explanations by the employer may reveal pretext); *Ellis Fischel State Cancer Hosp.,* 629 F.2d at 566 (sudden, unexplained decline in performance evaluation may support finding of retaliation). Even viewing Keene's layoff as based on dual motives, Ebasco did not argue or show by clear and convincing evidence that it would have laid him off in the absence of his protected activity.[10] The employer bears the risk that the influence of legal and illegal motives cannot be separated. *Passaic Valley Sewerage Comm'nrs v. Martin,* 992 F.2d 474, 482 (3d Cir. 1993).

As a remedy the ALJ recommends that Keene's "fair" appraisal be expunged and that he receive back pay from March 25 until April 13, when he started another job at a higher salary than he was earning at South Texas. The ALJ deducted unemployment compensation that Keene received before starting the new job. R. D. and O. at 13; Errata, dated October 10, 1995, at 1. We adopt the ALJ's recommendation except that, in

accordance with prior DOL whisleblower decisions, Keene's unemployment benefits are not deductible from gross back pay. *See Artrip v. Ebasco Serv., Inc.,* Case No. 89-ERA-23, Board Dec., Sept. 27, 1996, slip op. at 4-5 and cases cited therein.

II. The May 24 Testing

The ALJ also concluded that the May 24 alcohol testing was retaliatory. He found that the testing "certainly" exceeded HL&P's Fitness-for-Duty procedures and was instigated by Ebasco Employee Relations Manager Casey Davis to discourage Keene's return to South Texas. R. D. and O. at 12. The ALJ explained that Keene was not a "visitor" on the premises subject

to for-cause testing, as that term is defined in the Fitness-for-Duty procedures. R. D. and O.

at 8-9; Respondent's Exhibit (RX) 1. We disagree with the ALJ's analysis.

It is undisputed that Keene had been drinking before arriving on site that day. Evanel Crenshaw, a former Ebasco employee who had no knowledge of Keene's protected activity, confronted Keene about smelling of alcohol, and he admitted having drank several beers. RX 20 at 2, 5, 11-12. Crenshaw was concerned, and even though she was not a supervisor, she told Keene to go to his truck in the parking lot:

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> A Because you are not supposed to drink on the job site. You are not supposed to, and everyone that has worked there knows that.
> Q Okay. But Van [Keene] wasn't working.
> A I understand that. But there is not supposed to be any drinking -- whether it be a visitor or not. You are just not supposed to.

RX 20 at 6, Block 34. Crenshaw felt strongly that Keene should not be on site drinking and she felt that he knew so. RX 20 at 12, Block 69. Crenshaw reported the incident to Davis.

Davis testified that based on Crenshaw's reaction and Keene's admission to drinking before coming on site, he contacted two HL&P employees, who were managers in the Fitnessfor-Duty program area, about whether Keene should be tested as a "visitor." T. at 304, 311, 322. The two HL&P employees, neither of whom had knowledge of Keene's protected activity, concurred and reaffirmed their decision at the hearing. T. at 382-83, 386-88. They believed that the odor of alcohol alone was sufficient to impose for-cause testing, which applied to any individual on South Texas property. T. at 380, 382, 388, 390.

There is testimony by the HL&P witnesses that Davis was required to report Keene's condition to HL&P under its Continuous Behavioral Observation Program. T. at 382-83.

Given Crenshaw's intense reaction to the situation and her testimony that, as a former and prospective employee, he should have known he was engaged in wrongdoing, it is not surprising that Davis believed further steps or discipline was necessary. Since two uninvolved HL&P employees validated that testing was the correct course, Davis' action was not unjustified or inappropriate.

Although Davis was aware of both Keene's protected activity and Kaminsky's desire not to rehire Keene, Davis had rejected Kaminsky's request that Keene not be rehired, stressing the value of Keene's unescorted access clearance. T. at 297-99.[11] The evidence does not demonstrate that Davis contacted HL&P and suggested testing as a means of obliging Kaminsky and discouraging Keene's return to South Texas because of his protected activity. *Cf. Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 8 (finding psychological fitness-for-duty evaluation ordered by employer to intimidate employee). Rather, it shows that Davis' impression that Keene was a "visitor" who should be tested was reasonable and honest. Even if he was mistaken, such a mistake under these circumstances is not a basis on which to find that he violated the ERA. *See Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1116 (2d Cir. 1988) (employer's reasons need not be well-advised, merely truthful); *Jefferies v. Harris Cry Comm. Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980) (employer's action based on mistaken but sincere belief does not violate Title VII). Assuming, however, that Davis had both legitimate and illegitimate motives, the reactions of Crenshaw and the two HL&P employees showing the seriousness of the offense convince us that Davis would have taken the same measure in response to such effrontery even if Keene had not engaged in protected activity.

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III. The June Employment

The ALJ rejected Keene's argument that the conditions of his employment upon returning to South Texas in June were retaliatory, and we agree. R. D. and O. at 12.[12] Keene himself testified that other electricians also were assigned to work on the carpentry job and some of them quit because they were aggravated or insulted by being asked to do work outside their trade. T. at 183-84. He was not assigned electrical work during the first four days because of various training requirements and unapproved work projects. T. at 179-83; CX 30 at 90; CX 12 at 8.

ORDER

The Preliminary Order in this case, dated December 11, 1995, is affirmed. Additionally, we order that Ebasco pay Keene the sum of $245.00, representing unemployment compensation which was erroneously deducted from his back pay award.

Keene is also entitled to an award of costs and expenses, including attorney fees, reasonably incurred in connection with this complaint. The preliminary order did not

include fees and expenses because the ALJ was unable to make a recommendation due to counsel's delay in filing a petition. Therefore, this case is remanded to the ALJ for a recommended decision on costs and expenses, including attorney fees.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[ENDNOTES]

[1]On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions.

[2]Houston Lighting and Power Company (HL&P), the owner of the nuclear project, was originally named as a respondent in this complaint but was dismissed based on Keene's motion filed at the commencement of the hearing. *See* Secretary's Decision dated August 23, 1995.

[3]The burdens of production and persuasion in whistleblower cases were laid out, as the ALJ indicated, in *Dartey v. Zack Co. of Chicago,* Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-9. R. D. and O. at 10. *See also Remusat v. Bartlett Nuclear, Inc.*, Case No. 94-ERA-36, Sec. Dec., Feb. 26, 1996, slip op. at 4-6; *Carroll v. Bechtel Power Corp.* Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 10-12, *aff'd,* No. 95-1729 (8th Cir. Mar. 5, 1996).

[4]Keene's immediate transfer to a different project before his work on the demin skid project was completed indicates that the complaints he raised were a "big deal" and caused the workers to become uncomfortable. Douglas told Teague that Keene was transferred because his fellow workers did not trust him. *See* CX 30 Tab 16.

[5]Ebasco had a shortage of certified electricians. T. at 237 (Douglas), 92 (Keene), 41 (Renfro).

[6]Johnson denied starting the investigation before Keene left, but he repeatedly stated in his deposition that he spent about two weeks investigating the concerns brought to him by

Riley. CX 31 at 20, 25, 41, 64. If so, Johnson must have started the investigation before Keene left. Even though Riley did not reveal Keene's name to Johnson until the day of Keene's termination, Riley had given Johnson a general description of Keene's concerns on or about March 18. T. at 216; *see also* CX 12 at K1177, K1267. The memorandum on a follow-up investigation conducted by Mike Head is dated March 31, 1994, less than one week after Keene was terminated. Johnson testified that Head was not advised of Keene's concerns until *after* he (Johnson) finished his investigation. CX 31 at 25, 65-66. We conclude that Johnson told Teague and Head on or about the day Keene was laid off. *See* T. at 288.

[7]Appendix B establishes quality assurance requirements for the design, construction, and operation of structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public.

[8]Teague understood the serious implications of the charge. Upon learning of Keene's concern he ordered a formal review of the facts "because of the type of allegations (falsification of records) which were brought forth . . . . " *See* CX 6.

[9]Johnson's testimony raises questions about Sciba's credibility in general. For example, in Sciba's interview with Teague, Sciba claims that he asked Johnson to investigate Keene's concerns. CX 30 Tab 9. However, Johnson testified that Sciba was angry that Johnson had undertaken an investigation without advising him. CX 31 at 41. Johnson also testified that Sciba either lied or misrepresented to the NRC concerning their conversation about Keene. CX 31 at 71-72; CX 14.

[10]Under the amended ERA, if the complainant proves that both legitimate and illegitimate reasons played a part in the respondent's decision, i.e., that the decision was based on "dual motives," then the respondent may avoid the ordering of relief if it "demonstrates by clear and convincing evidence" that it would have taken the same action in the absence of the complainant's protected activity. 42 U.S.C. § 5851(b)(3)(D); *Remusat,* slip op. at 3; *Yule v. Burns Int'l Sec. Serv.,* Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-8.

[11]There is no evidence to support a finding that Ebasco knew Keene met with a congressional investigator in April.

[12]The record does not show that alleged discriminating officials had become aware of Keene's June 2 letter, but even if they had, our conclusion would be the same.